No. 10,271

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ANDERSON-COTTONWOOD IRRIGATION DISTRICT,

Appellant,

vs.

J. R. MASON,

Appellee.

APPELLANT'S OPENING BRIEF.

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Subject Index

Table of Authorities Cited

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APPELLANT'S OPENING BRIEF.

This appeal is an outgrowth of a proceeding by Anderson-Cottonwood Irrigation District, hereinafter called "The District" for the confirmation of its Plan of Composition of outstanding indebtedness, filed in the District Court of the United States of the Northern District of California, Northern Division, hereinafter called "The District Court", under what is now chapter IX of the Bankruptcy Act.

Appeals growing out of this proceeding have been before this Court on two separate occasions. The history of the proceeding is summarized in an agreed statement of facts contained in the transcript of record filed herein, which will be referred to in this brief by the initial "R" in parenthesis followed by the page of the transcript to which reference is made.

BASIS OF JURISDICTION.

The facts essential to the jurisdiction of the District Court and of this Court are set forth in the transcript (R pp. 2-27), from which it appears that after Appellee herein and certain other creditors of the district had appealed from the Interlocutory Decree confirming the Plan of Composition, that appeal was dismissed by this Court and that thereafter a Final Decree was entered in the District Court, which is set forth in full in the record (R pp. 3-9).

J. R. Mason appealed from the Final Decree and this Court affirmed it in a proceeding numbered 9951 in this Court. The affirming opinion is set forth in 126 Federal Reporter (2nd series) at page 921.

Thereupon Mr. Mason applied to the Supreme Court of the United States for a Writ of Certiorari to review the decision of this Court (R pp. 16 and 17).

The Supreme Court denied a Writ of Certiorari June 1, 1942 (R p. 17), and the mandate of this Court showing the affirmance of the Final Decree was issued June 6, 1942 (R pp. 17 and 18). An endorsement on the Mandate shows that it was filed and spread upon the minutes of the District Court June 9, 1942 (R p. 19).

Thereafter, Mr. Mason filed in the Supreme Court of the United States, a petition for a rehearing of his petition for a Writ of Certiorari.

On the 29th day of June, 1942, which by an obvious typographical error appears in the transcript as 1924, a motion in behalf of Mr. Mason was made in the

District Court "for an order suspending that part of the Final Decree which provides that the creditors must surrender and deposit their bonds with the Clerk of this Court [meaning the District Court] on or before July 7th, 1942 or be thereafter barred from collecting the amount provided by the Plan of Composition, and ordering that the time be extended until a reasonable period of time after the United States Supreme Court may have passed upon the petition for rehearing" (R pp. 19 and 20).

On July 1, 1942, the District Court made a Minute Order as follows (R p. 22):

> "The motion to suspend certain parts of final decree having been heretofore heard and submitted, being now fully considered, it is Ordered that the motion be and the same is hereby granted upon the condition that a bond in the sum of $500.00 be given to secure the District against damages and costs. It is further Ordered that the creditors are hereby granted an extension of time to October 31st, 1942, within which to deposit their bonds with the Clerk of this Court instead of July 7th, 1942, as provided in the final decree."

From this Order an appeal was duly taken by the district (R pp. 22-27).

Jurisdiction of the District Court to make any order affecting the Final Decree rests upon the 3rd paragraph of section 350 of title 28 U. S. C., which reads as follows:

> "In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execu-

> tion and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to apply for and to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of good and sufficient security, to be approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay."

Jurisdiction is conferred upon this Court to hear and determine the appeal from said order of the District Court by Sections 24 and 25 of the Bankruptcy Act, as revised by the Chandler Act of June 22, 1938. It is provided in said Section 24 that when any order, decree or judgment involves less than $500.00 an appeal therefrom may be taken only upon allowance of the Appellate Court.

This case involves more than $500.00 because it appears from the receipt given by the Clerk of the District Court to Mr. Mason for bonds deposited with the Clerk (R pp. 44-46) that Mr. Mason owns 41 bonds of the denomination of $1000.00 each. These bonds were transmitted to the Clerk by Mr. Mason July 3, 1942, but not for payment as required by the Final Decree (R p. 7). That decree provides that any bonds "not so deposited" within one year from

the date of the decree, which was July 7, 1941, "shall thereafter be forever barred from participating in the Plan of Composition or in the funds held in the registry of this Court." Therefore, unless Mr. Mason is protected by the District Court's order of July 1, 1942, he will not receive any payment for his bonds.

It is stipulated at the end of the Agreed Statement (R p. 28) that the transcript of record on appeal in Case No. 9951 in this Court shall be a part of the Record on Appeal herein but need not be reprinted. It appears on page 8 of that record that the district's plan of composition provided for a payment of 30% of the principal of the outstanding bonds of the district with a certain additional payment for interest. Therefore the amount involved in this appeal is much more than $500.00.

THE ISSUE OF THIS APPEAL.

From the foregoing statement it is obvious that the issue involved in this appeal is simple. *It is a matter of upholding the dignity and authority of this Court.* It may be stated as follows:

> *After this Court has affirmed a decree and the Supreme Court has denied certiorari and the mandate of this Court has been transmitted to the District Court, has the District Court power to change the decree so that it will no longer be the decree that this Court affirmed?*

After the Supreme Court had denied Certiorari, Mr. Mason applied for a rehearing, but the application

was too late for the Supreme Court to pass upon it before the summer recess. Then he applied to the District Court "to suspend" the decree which this Court had affirmed and the District Court thereupon made the order from which this appeal is taken.

Before the Supreme Court had denied Certiorari, application had been made, by affidavit filed in this Court (R. pp. 14 and 15), for an order "suspending the running of the time for the presentation of Appellant's claims", pending the determination of his petition for certiorari.

An order was issued by a Judge of this Court, suspending the running of the time for the Appellant to present his bonds until 60 days after the Supreme Court had "passed upon" Mr. Mason's application for Certiorari. The Supreme Court did pass upon that application by denying it June 1, 1942. Hence this order is now no protection to Mr. Mason even if it were valid. This is Mr. Mason's own view, expressed in a letter to the Clerk of the District Court, in which after referring to this order he said: "which order operates to suspend until 60 days after June 1, 1942, any running of time for the deposit of the bonds and coupons" (R. p. 42).

We respectfully suggest, however, that under Section 350 of Title 28, U. S. C., an order staying the execution of a decree in order that one may apply for a Writ of Certiorari must be made by a Judge of the Court that issued the decree or by the Supreme Court. We have searched in vain for any other authority to stay a decree.

SPECIFICATION OF ERRORS AND POINTS ON APPEAL.

While the appeal really presents but one issue, we have stated in our designation of points on appeal (R. pp. 47 and 48) three points on which we rely. They imply three errors by the District Court in making the order from which we have appealed. These points are as follows:

1. That the District Court had no power to stay the enforcement of said Final Decree beyond the time when the Supreme Court of the United States shall have passed upon Appellee's Petition for Rehearing of his petition for a writ of certiorari.

2. That the District Court had no power to change the terms of said Final Decree in any manner whatsoever.

3. That said District Court had no power to grant to creditors of Appellant an extension of time to October 31, 1942, within which to deposit bonds with the Clerk of said Court for payment.

ARGUMENT.

I. THE DISTRICT COURT'S POWER WAS LIMITED TO STAYING THE ENFORCEMENT OF THE FINAL DECREE FOR A REASONABLE TIME TO ENABLE MR. MASON "TO APPLY FOR AND TO OBTAIN" A WRIT OF CERTIORARI.

The wording of Section 350 of Title 28, U. S. C., above quoted, is peculiar. It does not authorize a stay merely to enable a litigant *to apply* for certiorari, but "to apply for *and obtain*" such a writ. Obviously if

the writ is not obtained, the decree again becomes effective.

There were two provisions of the Final Decree in this case that could be affected by the stay authorized by the statute. One was the bar by which Mr. Mason was prevented from participation in any funds in the registry of the Court if he had not presented his bonds for payment by July 7, 1942. The other was the requirement that the Clerk notify the Reconstruction Finance Corporation after the expiration of twelve months of the amount of money remaining in the registry of the Court and that it was available for the purchase of bonds of the District held by that corporation (R pp. 7 and 8). A proper order would have stayed the enforcement of these provisions to allow Mr. Mason to obtain a writ of certiorari. If he had obtained the writ, of course, the whole matter would have been transferred to the Supreme Court, and if that Court had modified the decree on review and had not affirmed the original time limit, Mr. Mason's rights to whatever benefits the modified decree gave him would have been preserved notwithstanding his failure to comply with the decree in its original form, for the bar of the decrees would have been stayed until certiorari was granted.

However, we have a letter from the Clerk of the Supreme Court, dated October 12, 1942, *stating that the Court had that day denied Mr. Mason's petition for a rehearing* (See also 63 S. Ct. 34). Thereupon the bar of the decree forthwith became effective as of the date fixed therein, and it would have been the Clerk's

duty to send notice to the Reconstruction Finance Corporation, as provided in the decree. However, to preserve the status quo pending the determination of this appeal, we filed in the District Court a supersedeas bond (R pp. 34-36) and in the order for that bond the District Court directed the Clerk not to pay out any money from the registry of the Court to any creditor of the District until this appeal "is finally determined or dismissed" (R p. 34).

If the decree had been for the foreclosure of a mortgage on the Appellee's home, it is obvious that the District Court could have stayed the foreclosure to enable Appellee "to apply for and obtain" a writ of certiorari to review the decree, but if he failed to obtain the writ, the decree would forthwith become effective and the foreclosure would be carried through with as little delay as possible. Likewise in this case Mr. Mason's failure to convince the Supreme Court that he was entitled to a review of the Final Decree herein means that the decree is in full force and effect, and, as he did not deposit his bonds for payment before July 7, 1942, *he is barred from participation in any funds in the registry of the Court.*

The only tribunal having authority to *change* any provision of the Final Decree was the Supreme Court of the United States, but under Section 350 of Title 28, U. S. C., above quoted, the District Court had authority to stay the enforcement of the decree to enable Mr. Mason "to apply for and to obtain" a writ of certiorari. Since he did not obtain the writ, he obviously became subject to all the provisions of the Decree.

There is no authority given to the District Court to "suspend" a decree that has been affirmed by this Court in order that one may apply for a Writ of Certiorari and, if he fails to obtain it, may escape the decree. The law does not contemplate that one may thus eat his cake and have it.

Mr. Mason must have known when he applied to the Supreme Court for a rehearing that he was in an extremely precarious position. Rehearings of petitions for certiorari are rarely granted by that Court. He had such faith in his petition that he took the chance that it might ultimately be granted, but he failed.

The motion in the District Court (R pp. 19 and 20) was for an order "suspending" that part of the Final Decree which provided that creditors must deposit their bonds with the clerk before July 7, 1942, and for an order extending the time until a reasonable period after the Supreme Court had passed upon the petition for rehearing. The granting of this motion was obviously in excess of the limited power conferred on the District Court by Section 350 of Title 28, U. S. C., which provides only for a *stay of the enforcement* of the Decree until a writ of certiorari could be *obtained.* The District Court undoubtedly had power to issue a stay that would have prevented the Clerk from notifying the Reconstruction Finance Corporation that he had some money available for the purchase of bonds until the motion for rehearing had been passed upon, but when that motion was denied the Final Decree again became effective and barred Mr. Mason from participation in the Plan of Composition or in any funds in the registry of the Court.

The stay authorized by statute is for a particular purpose, and when that purpose fails, the decree again becomes effective.

Mr. Mason might have been in a better position if he had applied to this Court for a stay of the Mandate, as was done in the case entitled

In re Woods, 143 U. S. 202, 12 S. Ct. 417, 36 L. Ed. 125.

This he did not do, and after the mandate was issued, as we shall see hereafter, the Judgment of this Court became binding on the District Court, subject only to the limited statutory power of that Court to stay the enforcement of the decree for one purpose only.

II. THE DISTRICT COURT HAD NO POWER TO CHANGE THE TERMS OF THE FINAL DECREE IN ANY MANNER WHATSOEVER.

It would seem that this proposition would need no argument. After this Court had refused absolutely to modify the provision in the Final Decree requiring all bonds to be deposited for payment by July 7, 1942, and had issued its mandate expressly declaring that the Decree be affirmed, we can think of no theory to justify the District Court in substituting its judgment for the deliberate judgment of this Court, which it did by ordering "that the creditors are hereby granted an extension of time to October 31st, 1942, within which to deposit their bonds with the Clerk of this Court, instead of July 7th, 1942, as provided in the Final Decree".

The principle applicable to the case was thus stated in

Sprague v. Ticonic National Bank, 307 U. S. 161, 59 S. Ct. 777, 83 L. Ed. 1184:

> "The general proposition which moved the Court—that it was bound to carry the mandate of the upper Court into execution and could not consider questions which the mandate laid at rest—is indisputable."

In that case, however, the matter which came before the Supreme Court was the allowance of counsel fees, which was held to be a matter supplemental to the original proceeding and on which the District Court was not bound by the mandate. In this case, however, the order of the District Court sets a new limit for the deposit of bonds, notwithstanding the fact that this Court refused after due deliberation, to modify the limit set in the Final Decree.

In support of the general proposition above stated, the Supreme Court cited

Kansas City Southern Railway Company v. Guardian Trust Company, 281 U. S. 1, 74 L. Ed. 659, 50 S. Ct. 194;

holding squarely that, after an appeal from a judgment, the lower Court is without power to modify the judgment but can only carry out the mandate of the upper Court regarding the judgment when such mandate is received. The language of the Court was positive and clear. It was as follows:

> "The mandate required the execution of the decree. *The District Court could not vary it or give any further relief.*" (Emphasis ours.)

Among the cases cited in support of this statement is

Ex Parte The Union Steamboat Company, 178 U. S. 317, 319, 44 L. Ed. 1084, 1085, 20 S. Ct. 904,

in which there is a quotation from

Ex Parte Sibbald v. United States, 12 Pet. 488, 492,

where the duty of an inferior Court upon receiving the mandate of a higher Court is thus defined:

> "Whatever was before the court and is disposed of is considered as finally settled. The inferior court is bound by the decree as the law of the case and must carry it into execution according to the mandate. They cannot vary it or examine it for any other purpose than execution; or give any other or further relief; nor review it upon any matter decided on appeal, for error apparent, nor intermeddle with it further than to settle so much as has been remanded."

This is in line with the general rule stated in Freeman on Judgments, 5th Edition, Section 205, where it is said:

> "It has been frequently held that when an appeal is perfected, the trial court loses jurisdiction and control of its judgments, at least so far as any right to vacate or set them aside is concerned."

This is supported by the citation of Federal and California cases and numerous cases from other jurisdictions.

Furthermore, it was held in a very early case,

Albers v. Whitney, Fed. Cas. No. 137,

that the power of the Court to amend judgments is dependent upon statute and Section 32 of the Judiciary Act of 1789 was quoted as limiting the power of the Court. This section is substantially the same as has been incorporated into the Judicial Code as Section 777 of Title 28 U. S. C. A. authorizing the correction of defects and want of form in judgments. Accordingly, it was said in the *Albers* case:

> "No authority is given to the courts of the United States to make any amendments of judgments except as to defects and want of form."

Rule 34 of the Supreme Court Rules states that no mandate issues upon the denial of a petition for writ of certiorari, but whenever such a writ is denied, the Clerk must enter an order to that effect and forthwith notify the Court below and counsel of record. Upon the denial of the writ of certiorari, a certified copy of the order denying the writ was transmitted to the Clerk of this Court, and thereupon the mandate of this Court affirming the final decree was transmitted to the District Court. Therefore, the District Court could not do otherwise than enforce the final decree, subject to its limited right to stay its enforcement.

It would be an anomaly in judicial procedure if the District Court could modify a decree after it had been affirmed on appeal and the Supreme Court had denied certiorari, merely because the Appellant had indicated his displeasure at the action of the Supreme Court by a petition for rehearing.

III. THE DISTRICT COURT HAD NO POWER TO GRANT TO CREDITORS AN EXTENSION OF TIME TO OCTOBER 31, 1942, WITHIN WHICH TO DEPOSIT BONDS WITH THE CLERK OF THAT COURT FOR PAYMENT.

This follows from the cases cited in support of our second point and from the very nature of the situation with which the District Court was confronted.

The decisions of this Court are *final,* subject only to review by the Supreme Court. That review, in cases of this kind is by Writ of Certiorari, which, as stated in Rule 38 of the Supreme Court Rules, *"is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor".*

In this case the matter of the 12-months limitation in the Final Decree for the deposit of bonds was not overlooked by this Court. It was shown in the opinion affirming the Final Decree that counsel for Mr. Mason distinctly raised the question of the propriety of that limit in one of the specifications of error which was filed on his behalf in the District Court, *but in the opening brief the point was not mentioned,* and we therefore assumed that it had been abandoned. An attempt was made to revive the point at the oral argument on the appeal and we objected. In its opinion affirming the final decree this Court said:

> "Our Rule 20, subdivision 2(d), provides that the brief shall contain 'a specification of errors relied upon, which shall be numbered and shall set out separately and particularly each error intended to be urged'. In view of the failure to specify the point or to argue it in the brief, the alleged error will not be considered."

This Court thereupon affirmed the Final Decree with the time limit, which Mr. Mason later found to be so inconvenient. If this Court was justified in thus upholding its rules, why should the District Court not be held to an equal respect for them?

It has been suggested that the limitation is unreasonable and was inserted by Judge Louderback in the decree by inadvertence. This is contradicted by the fact that counsel for Mr. Mason endorsed on the decree as proposed by counsel for the District his disapproval on the specific ground, among others, that it provided for a time limit for the deposit of bonds "which is not within the scope of section 83 of the Bankruptcy Act" (R p. 10). He did not rest on this objection, but followed it up by submitting to the judge a substitute for the proposed Final Decree from which any time limit for the deposit of bonds was eliminated (R pp. 10-13), and further filed in the District Court a memorandum, in which he distinctly made the point that there was no provision in the statute for such a time limit, and that, if any limit was to be imposed, it should not be less than four years (R pp. 13 and 14).

It cannot therefore be urged that the Final Decree with the time limit was inadvertently signed.

We then have the situation of a decree deliberately signed and entered and duly appealed from and deliberately affirmed by this Court with full knowledge that it contained the time limit. It thus became, as was said in

Ex parte Sibbald v. United States (supra),

"the law of the case".

The Supreme Court has twice refused a Writ of Certiorari to review this decision, and it stands as the final judgment of this Court, which under the circumstances is the Court of last resort.

Under what theory then has the District Court power to make an order granting the creditors "an extension of time to October 31st, 1942, within which to deposit their bonds with the Clerk of this Court *instead of July 7th, 1942 as provided in the final decree?*" (Emphasis ours.)

That is not a stay, or even a suspension of the decree. It is a plain change in one of its essential terms. It is in effect saying to this Court that the decree as affirmed contained a time limit that is too short and so it must be changed from July 7th to October 31st, notwithstanding that it has become the law of the case.

To reverse this order and uphold the doctrine of the finality of decrees of this Court may operate harshly on Mr. Mason, but it is more important to vindicate the authority of our Courts of last resort than to please an individual who took a chance on the "sound judicial discretion" of the Supreme Court and failed.

It was said in

Calef v. Parsons, 48 Ill. App. 253, 258:

> "The Court had judicially determined that matter, and, whether right or wrong, such determination was conclusive as long as it was permitted to remain without amendment. No other rule would enable one to deal safely with property subject to judgment lien."

It is an ancient maxim that Equity follows the law, and it does so whether the law be established by Statute or judicial decree, if the establishment is conclusive. Thus in

Van Dyke v. Arizona Eastern R. Co., 18 Ariz. 220, 157 Pac. 1019,

it was said:

> "A railroad right of way fixed by law at a certain number of feet on each side of the track cannot be reduced merely because equitable considerations would seem to entitle adjoining landowner to a portion of such right of way."

This is equally true of a final adjudication by a Court of competent jurisdiction, particularly where the question litigated has been the subject of an appeal. Thus it is said in

4 *Corpus Juris,* p. 1213:

> "It is a general rule that the decision of an appellate Court is the law of the case in further proceedings in the cause in the trial Court."

On page 1214 of the same volume it is further said:

> "The rule is especially applicable where the Court has remanded the cause with specific directions as to the steps to be taken by the lower Court."

The matter of the time limit was an essential part of the Final Decree in question here. Because the objections to it were not properly taken under the rules of this Court, the decree was affirmed. Thus it was the solemn adjudication of this Court that Mr. Mason must deposit his bonds with the Clerk of the District Court for payment by July 7, 1942, or be

forever barred from participation on any funds in the registry of the Court. The change in this date to October 31st by the District Court was clearly unauthorized and was error.

Mr. Mason deposited his bonds with the Clerk July 3, 1942, but not in compliance with the Final Decree (R pp. 41-46). In transmitting the bonds he wrote a letter, dated at San Francisco July 3, 1942, in which he said (R p. 43):

> "No transfer of the title to any bonds or coupons handed you herewith is effected or consented to by this deposit, and I decline to take the money payable by you under the said Final Decree at this time, and protest the said Final Decree insofar as the same is not final but possibly none the less operative, and if as a result of the Petition for Rehearing the said Final Decree should be reversed, I intend to, and will claim each and every right that I am entitled to under and by virtue of my ownership or possession of the above listed bonds and coupons, and you shall return to me or my order these securities on demand."

The clerk's receipt for these securities (R pp. 44-46) is also dated July 3, 1942. It acknowledges receipt of the bonds and coupons "in accordance with the terms *and conditions*" of Mr. Mason's letter of July 3rd.

This deposit of course was far from a compliance with the Final Decree. It provided (R p. 7) that $24,799.14 paid into the registry of the Court by the Disbursing Agent, whose report is approved by the decree, shall be disbursed "for the purpose of taking

up and retiring and refinancing, in accordance with the plan of composition approved in this cause, such remaining outstanding old obligations of the petitioning district as are affected by the plan of composition, and which may be presented to the registrar *for that purpose,* within the period of twelve months from the date hereof".

Mr. Mason's bonds and coupons were "old obligations" of the District, and the money to pay for them in accordance with the plan of composition was included in the Disbursing Agent's deposit in the registry of the Court.

It was further provided in the Final Decree that all the old obligations which are not "so presented", which clearly means *presented for payment,* within 12 months from the date of the decree shall "thereafter be forever barred from participating in the plan of composition or in the funds held in the registry of this Court".

There is something else in the Final Decree which Mr. Mason evidently overlooked when applying to the District Court for the order "suspending that part of the Final Decree which provides that the creditors must surrender and deposit their bonds with the Clerk of this Court on or before July 7, 1942, or be thereafter barred from collecting the amount provided by the plan of composition, and ordering that the time be extended" (R pp. 19 and 20). That was the provision (R pp. 8 and 9) that all the old obligations of the District affected by the plan of composition, whether heretofore surrendered and cancelled

or remaining outstanding, and by whomsoever held, are by the decree "cancelled, annulled and held for naught as enforcible obligations" of the District, except as in the decree provided, and their holders were "forever restrained and enjoined" from asserting any claim or demand whatsoever therefor, except as provided in the decree.

Therefore the bonds of Mr. Mason *are now worthless unless the decree be changed,* and we have shown that the Supreme Court is the only tribunal having power to change it, and that Court has declined to do so.

For the reasons herein set forth we believe the order appealed from should be reversed and that the District Court should be directed to instruct its Clerk to notify the Reconstruction Finance Corporation of the amount of money remaining in the registry available for the purchase of new bonds of the District held by that corporation, and otherwise to proceed to carry out the Final Decree.

Dated, Stockton, California,
November 27, 1942.

Respectfully submitted,
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